

Respondent raises the issue of nature and extent of claimant's disability. Respondent argues that the ALJ erred in finding that the money claimant received from performing foster care did not constitute wages for the purpose of determining claimant's post-injury wage loss, if any. Respondent maintains claimant's pay for post-injury foster

care exceeded his pre-injury average weekly wage, thus entitling claimant to PPD based on his functional impairment only.

Claimant contends he earned no post-injury wages because as a foster parent he rendered no services, performed no work and earned no wages. Claimant argues that he received nontaxable stipends by virtue of providing foster care and that the stipends were intended to pay claimant for expenses associated with caring for the foster children. Therefore claimant concludes that the ALJ correctly found that he sustained a 100% wage loss. Claimant raised an issue regarding underpayment of temporary total disability (TTD) benefits, however, counsel advised at oral argument that TTD is no longer an issue.

The issues for the Board's consideration are:

What is the nature and extent of claimant's disability?

(1) What is claimant's permanent functional impairment?

(2) To what extent, if any, is claimant entitled to work disability?

(a) What is claimant's wage loss, including whether claimant's receipt of stipends for being a foster parent should be considered in determining claimant's post-injury wages?

(b) What is claimant's task loss?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant, who was age 41 at time of his October 17, 2011 regular hearing testimony, began working for respondent as a direct care staffer in February 2009. Respondent provided day and evening services for handicapped individuals, referred to by claimant as "clients." Claimant's job duties included transporting clients to and from activities. He used a van owned by respondent to transport the clients.

Claimant described his April 28, 2010 accident as follows:

I was in Andover going south on Indianola Road and a dump truck was coming out traveling west and for some reason or another he didn't see us and he just pulled

out and I had to swerve, had to swerve around the dump truck and ended up going airborne and we hit a tree. I had two clients inside the vehicle with me.¹

As a consequence of the accident, claimant alleged injuries to his back, neck, bilateral shoulders and right hip. Claimant was transported by ambulance to Via Christi-St. Francis Hospital in Wichita where he was examined, admitted overnight, and released. There is no dispute regarding the compensability of this claim.

Following claimant's hospital visit, he sought treatment from Dr. David Hufford and, thereafter, at respondent's request, with Dr. Travis Hubin. Dr. Camden Whitaker, a board certified orthopedic surgeon, examined claimant on June 23, 2010, at the request of respondent. Claimant told Dr. Whitaker that the posterior neck pain he experienced after the accident had resolved but he still had right shoulder pain. Claimant also expressed symptoms in the right low back and right leg.

Dr. Whitaker referred claimant to Dr. Daniel Prohaska due to complaints of right shoulder pain. Dr. Prohaska, a board certified orthopedic surgeon, examined claimant on July 22, 2010. Based on his evaluation the doctor diagnosed claimant with a right shoulder injury and traumatic impingement syndrome. Dr. Prohaska prescribed anti-inflammatory medication and physical therapy.

At a follow-up visit with Dr. Prohaska on September 9, 2010, claimant reported no improvement of his pain. Dr. Prohaska recommended a right shoulder diagnostic arthroscopy and subacromial decompression, which Dr. Prohaska performed on October 20, 2010. Claimant underwent physical therapy and, two months later on December 14, 2010, he was released by Dr. Prohaska at maximum medical improvement (MMI).

On September 13, 2010, claimant returned to see Dr. Whitaker. Claimant complained of right hip and right leg pain. X-rays of the lumbar spine revealed mild spondylolisthesis at L4-5 with some right hip arthrosis. Dr. Whitaker recommended further imaging studies.

A lumbar CT scan was performed on October 12, 2010, which revealed disc osteophyte complex and some degenerative facet changes on the right at L3-L4, narrowing of the right neuroforamina and lateral recess, with mild spinal stenosis at that level. The CT scan also showed mild degenerative facet changes at L4-L5. A lumbar myelogram was conducted on October 12, 2010, which revealed probable disc bulging without significant stenosis.

¹ P.H. Trans. at 7.

Claimant was again examined by Dr. Whitaker on December 15, 2010. The doctor diagnosed stenosis at L3-4 and L4-5 with spondylolisthesis of L4 on L5 causing right hip symptoms. Dr. Whitaker recommended a right-sided L4-5 transforaminal epidural steroid injection. At his deposition, Dr. Whitaker opined claimant's spondylolisthesis and spinal stenosis were not causally related to his accident on April 28, 2010, however, he admitted on cross-examination that claimant's accident aggravated his preexisting degenerative conditions.

Claimant declined the steroid injection. On January 31, 2011, Dr. Whitaker found claimant had achieved MMI and released him from care. Dr. Whitaker imposed no permanent restrictions from the standpoint of claimant's spine and found no permanent functional impairment. Dr. Whitaker testified claimant did not lose any task performing ability.

Based on the *AMA Guides*,² Dr. Prohaska rated claimant's right shoulder at 2% due to weakness on external rotation. No work restrictions were assigned for claimant's right shoulder. Dr. Prohaska opined that claimant did not suffer any loss of ability to perform work tasks because he imposed no permanent work restrictions relative to the right shoulder.

Dr. Pedro Murati, a board certified physician in rehabilitation and physical medicine as well as an independent medical examiner, evaluated claimant on March 31, 2011, at the request of claimant's attorney. Claimant complained of right hip pain, occasional numbness and tingling that radiated down his right leg. The doctor reviewed claimant's medical records, took a history, and performed a physical examination.

Dr. Murati's diagnostic impressions were status post right shoulder diagnostic arthroscopy with subacromial decompression; right SI dysfunction; and low back pain with signs and symptoms of radiculopathy for which claimant was not at MMI. Dr. Murati opined that claimant's diagnoses were a direct result of his work-related accident sustained on April 28, 2010. Dr. Murati recommended cortisone injections for the right SI joint dysfunction to decrease inflammation; physical therapy with possible instruction in the use of an SI belt and/or gait training; use of anti-inflammatory medications; and use of pain medication. For claimant's low back pain and symptoms of radiculopathy, Dr. Murati recommended a bilateral lower extremity NCS/EMG to include the lumbar paraspinal muscles, a CT myelogram of the lumbar spine, and medications for pain and inflammation. In Dr. Murati's opinion, surgical evaluation may be needed depending on claimant's response to conservative treatment.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

Based on the *AMA Guides*, Dr. Murati rated claimant's right upper extremity at 10% at the shoulder for the right shoulder subacromial decompression. He added 10% impairment to the right shoulder due to loss of range of motion. Dr. Murati's right upper extremity impairments combine to 19% permanent functional impairment to the shoulder, which converts to an 11% whole person impairment. Dr. Murati rated claimant's low back at 10% whole person impairment based on the *AMA Guides'* Lumbosacral DRE Category III. The 11% and 10% whole person impairments combine for a 20% whole body impairment.

Dr. Murati placed permanent restrictions on claimant's physical activities based upon an 8-hour work day as follows: (1) no crawling, climbing ladders, stooping, bending or crouching; (2) no lifting or carrying greater than 20 pounds; (3) no pushing or pulling greater than 20 pounds; (4) no work performed more than 24 inches from the body; and, (5) no work above chest or shoulder level. Dr. Murati opined that claimant should alternate sitting, standing and walking.

Dr. Murati reviewed the list of claimant's work tasks performed in the 15 years prior to the accidental injury prepared by Jerry Hardin.³ Dr. Murati concluded claimant can no longer perform 18 of the 49 tasks identified by Mr. Hardin, for a 37% task loss.

Dr. John Estivo, a board certified orthopedic surgeon, examined claimant on May 27, 2011, at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history, and performed a physical examination. Claimant complained of pain radiating down the right leg. Dr. Estivo's examination revealed that claimant's lumbar spine was tender to palpation on the right side. Dr. Estivo also found positive straight leg raising on the right at 80 degrees. X-rays were taken of claimant's lumbar spine which disclosed degenerative changes and Grade I spondylolisthesis at L4-5.

Dr. Estivo diagnosed protruding discs at L3-4 and L4-5 with spinal stenosis causally related to the work injury of April 28, 2010. The doctor recommended that claimant receive epidural injections and/or surgery, both of which claimant declined. Dr. Estivo also found claimant had reached MMI regarding his work injury.

Based upon the *AMA Guides*, Dr. Estivo placed claimant in DRE Category III for a 10% whole person functional impairment based on signs and symptoms of lumbar radiculopathy. The doctor placed claimant under permanent restrictions of no lifting greater than 50 pounds and no constant bending or twisting. Dr. Estivo reviewed the list

³ Jerry D. Hardin, a vocational consultant, conducted a personal interview with claimant on August 8, 2011, at the request of claimant's attorney. He prepared a list of 49 non-duplicative work tasks claimant performed in the 15-year period before his injury.

of work tasks claimant performed in the relevant 15-year period, prepared by Mr. Benjamin⁴, and concluded claimant could no longer perform 8 of the 65 tasks for a 12.3% task loss. Dr. Estivo also reviewed Mr. Hardin's task list and concluded claimant could no longer perform 8 of the 49 tasks for a 16.3% task loss.

Claimant last worked for respondent on the date of accident, April 28, 2010. Thereafter, claimant's sole source of income was stipends he received for providing foster care. Claimant was a foster parent for two school age children when he testified at the regular hearing. Claimant had not applied for work since he was released from medical treatment. Claimant received the stipends from a company called Youthville, which arranged for claimant to take care of foster children.

Pay records from Youthville covering the period from December 16, 2010 through December 15, 2011, were stipulated into evidence by the parties. The records document that claimant received stipends totaling \$41,814 or an average of \$804.11 per week.

At the time of the October 17, 2011 regular hearing, claimant had been a foster parent for about a year. Claimant testified he received about \$1,200 every two weeks. The amounts he received from Youthville fluctuated. Claimant testified there were no restrictions on how he used the stipends, however, claimant was obliged to see that all of the children's needs were met. Claimant considered the stipends "to be income for me to take care of these kids."⁵ As long as the kids were properly taken care of, claimant could use the stipends in any way he saw fit. Claimant admitted that he could spend some of the stipends for personal expenses.

Claimant paid his rent, utilities, and living expenses from the stipends.

A letter dated December 5, 2011, authored by Dawn Howland, LBSW, a specialized foster care worker for Youthville, was stipulated into evidence on March 1, 2012, and provides:

This letter is being provided to explain the Foster Care payment system for Youthville Foster Homes. Youthville policy states, "A Foster parent is not an employee nor do they earning [sic] an income, they receive a non taxable stipend to support the children placed in their home." Youthville provides and establishes reimbursement payments based on it's [sic] determination of the cost of maintaining

⁴ Steve Benjamin, a vocational consultant, conducted an interview with claimant on August 3, 2011, at the request of respondent's attorney. Mr. Benjamin prepared a task list of 65 non-duplicative work tasks claimant performed in the 15-year period before his injury.

⁵ R.H. Trans. at 32.

a youth. Reimbursement will be made according to the days in care for the preceding month. Youthville does not pay for the last day in care. The daily rate may change according to the assessed level of care of the youth. In receiving this stipend the foster parent is agreeing to be responsible for all personal expenses of the youth (i.e. clothing, school fees, allowance, personal items, etc and that clothing and personal items move with the child when they leave the resource home). Foster parents are also responsible for transporting the child to all appointments, functions and school activities. Medical, dental and optical needs of the youth will be provided for through the state medical card or the youth's birth family's insurance. If a need is identified for additional resources to provide a special item for the child, the resource parents will contact their foster care worker to see if there are any options through Youthville. If there are concerns that the child's physical needs are not being met with the agreed stipend, foster parents will be asked to provide documentation of money spent.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as

long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Act recognizes two different classes of permanent injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.⁶ The record establishes that claimant sustained a permanent general bodily disability.

Under K.S.A. 44-510e(a), permanent partial general disability may be calculated in two ways: (1) based on a statutorily defined work disability, or (2) based on an overall functional impairment. An injured worker is entitled to the greater of the two.⁷ The calculation of work disability is based on two factors: (1) medical evidence of the employee's percentage loss of ability to perform work-related tasks, and (2) the employee's actual wage loss. After the task loss and wage loss percentages are computed, the percentages are averaged and a formula is utilized to calculate the injured worker's PPD award.⁸ Wage loss must be based on a claimant's actual post-injury earnings.⁹

The Board finds that the ALJ's award should be affirmed in part, reversed in part, and remanded for further proceedings.

Judge Clark found the functional ratings of Dr. Estivo, the medical expert retained by respondent, and Dr. Murati, the medical expert retained by claimant, were entitled to equal weight. The Board agrees and finds claimant sustained a 15% permanent functional impairment to the whole body. The rating opinions of Drs. Whitaker (no impairment) and Prohaska (2% to the right shoulder) are unpersuasive in view of the ratings of Drs. Murati and Estivo and the nature of the injuries claimant sustained, which necessitated surgical treatment to the right shoulder. The Board also finds the ALJ's finding of 24% task loss is supported by a preponderance of the credible evidence and is hereby adopted by the Board.

Under K.S.A. 44-510e(a) quoted above, an employee with a general bodily disability is entitled to PPD based on work disability if such disability exceeds the employee's permanent functional impairment but only "as long as the employee is engaging in any

⁶ K.S.A. 44-510d; K.S.A. 44-510e.

⁷ *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, rev. denied 286 Kan. 1186 (2008).

⁸ *Stephen*, 38 Kan. App. 2d at 990.

⁹ *Nisler v. Footlocker Retail, Inc.*, 40 Kan App. 2d 831, 196 P.3d 395 (2008)

work for wages equal to 90% or more of the gross average weekly wage that the employee was earning at the time of the injury.” “Wages” is not specifically defined in 44-510e, but it is defined in the Act in K.S.A 44-511(a), which provides that “wage” shall be construed to mean the total of money and additional compensation which the employee receives for services rendered for the employer. “Money” is defined as the gross remuneration at which the service rendered is recompensed in money by the employer. “Additional compensation” is defined to mean gratuities in cash received by the employee from persons other than the employer; cash bonuses paid by the employer; board and lodging furnished by the employer; cash value of remuneration in any medium other than cash; and employer contributions to life, health, and accident insurance, and employer contributions to pension and profit sharing plans. Essentially, “wage” is the sum of money and additional compensation an employee receives in exchange for work performed.

The stipends paid by Youthville to claimant were in part income to claimant. Claimant testified that the stipends were his sole source of income. Part of the stipends were economically beneficial to claimant personally. Claimant received the stipends in exchange for work he performed for Youthville in taking care of foster children. Claimant did not consider the stipends as income for himself but rather characterized the stipends as “income for me to take care of these kids.”¹⁰ The letter from Ms. Howland tends to support claimant’s argument that the stipend was not a wage or income. However, the preponderance of the evidence supports the finding that claimant was free to use, and did use, the proceeds of the stipends for strictly personal reasons, such as providing his own living expenses. Accordingly, a portion of the stipends must be considered wages for purposes of determining post-injury wage loss.

On the basis of the record before the Board it cannot be accurately determined what part of the stipends was used to provide care for the foster children and what part was utilized for claimant’s personal benefit. The Board is accordingly unable to determine claimant’s actual post-injury wage vis-a-vis the 90% threshold of K.S.A. 44-510e and his eligibility for work disability benefits. It is also not possible to compute the extent of claimant’s work disability if he is in fact entitled to such benefits.

The Board has the authority to remand any matter for the ALJ for further proceedings.¹¹

¹⁰ R.H. Trans. at 32.

¹¹ K.S.A. 44-551(i)(1).

The Board finds that the ALJ's findings regarding functional impairment and task loss are affirmed; that the award is reversed to the extent it awards claimant work disability benefits; and that the claim be remanded to the ALJ with directions to reopen the record, provide the parties a reasonable time to present additional evidence regarding claimant's wage loss, and to make a determination of what percent of the stipends goes to the benefit of the children and what percent goes to claimant's benefit. The benefit applicable to claimant should then be used by the ALJ to determine claimant's post-injury wage loss.

The Board concludes:

(1) Claimant sustained a 15% permanent functional impairment to the whole body.

(2) Claimant's task loss is 24%.

(3) There is insufficient evidence to determine the extent of claimant's wage loss. The claim is accordingly remanded to the ALJ with directions to reopen the record, provide all parties a reasonable time to present further evidence regarding the extent to which the stipends received by claimant go to benefit the foster children and what percent goes to claimant's benefit. The ALJ must then use the benefit applicable to claimant in calculating claimant's post-injury wage loss.

The Board does not retain jurisdiction of this claim.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated April 4, 2012, should be, and hereby is, affirmed in part, reversed in part, and remanded for further proceedings with directions as specifically set forth in this Order.

IT IS SO ORDERED.

¹² K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of November, 2012.

BOARD MEMBER

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